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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. McNICHOLS, JR., et al.,

Petitioners,

vs.

MALCOLM BALDRIGE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of Amici Curiae, Plaintiffs in MDL-444, In Re: 1980 Decennial Census Adjustment Litigation, In Support of the Petitioners.

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INTEREST OF AMICI CURIAE

On June 15, 1981, in a case challenging the accuracy of the 1980 decennial census, this Court granted certiorari on a petition by the City and County of Denver ("Denver") to consider the question of whether addresses of *vacant* housing units are protected from discovery by the Census Act. *McNichols v. Baldrige*, 644 F.2d 844 (10th Cir. 1981), *cert. granted*, 49 U.S.L.W. 3931 (June 15, 1981) (No. 80-1781). This Amicus Brief supports Denver's position that lists of vacant addresses are not protected from discovery in litigation challenging the conduct of the census.

The Amici in this case are thirty-eight states, counties, cities, and towns and two private plaintiffs who have sued the United States Census Bureau ("Bureau") in order to obtain an accurate count in the 1980 decennial census. Each of the Amici (hereinafter referred to as the "MDL plaintiffs") has brought a separate action in its local district court alleging that the Bureau failed to count all the people in the various governmental units represented by the MDL plaintiffs. Each MDL plaintiff must have the Master Address Registers for its particular geographic area in order to prove the Bureau's failure to count and in order to provide the local district court with a means of correcting the inaccurate count.

The MDL plaintiffs' joint interest in Denver's case arises out of the consolidation of the 1980 census cases by the Judicial Panel on Multidistrict Litigation. On January 16, 1981, all pending census cases were transferred to the District Court in Baltimore, Maryland for coordinated pretrial proceedings before Chief Judge Edward S. Northrop. *In Re: 1980 Decennial Census Adjustment*

Litigation, 506 F. Supp. 648 (J.P.M.D.L. 1981).[1] By order dated April 15, 1981, the MDL Court permitted

1. As of July 27, 1981, the following cases had been transferred to the MDL Court pursuant to 28 U.S.C. §1407: *Goodman v. Klutznick*, No. 81-70193 (E.D. Mich.); *Dona Ana County v. Klutznick*, Civ. No. 80-676 M. (D.N.M.); *Del Bello v. Klutznick*, No. 80 Civ. 7195 (S.D.N.Y.); *Board of Commissioners v. Klutznick*, No. C-1-81-029 (S.D. Ohio); *Overstreet v. Baldrige*, No. J-81-0007-Civ. (D. Alas.); *Cole v. Klutznick*, No. 81-0049-P.G. (D.P.R.); *Fahy v. Klutznick*, No. 81-617 (D.N.J.); *Sharrow v. Reagan*, No. 81 Civ. 1953 (S.D.N.Y.); *Connell v. Baldrige*, No. Civ. 81-5029-CV-SW (W.D. Mo.); *Meyers v. Baldrige*, No. B-8161-CA (E.D. Tex.); *Munzert v. Baldrige*, No. 80-5369 (S.D. Ill.); *Louisiana v. Klutznick*, No. 81-004-A (M.D. La.); *Clark v. Klutznick*, No. 80-4153 (D.N.J.); *City of Hobbs v. Klutznick*, No. 80-792 (D.N.M.); *Sullivan v. Klutznick*, No. A-80-397-Civ. (D. Alas.); *McLaughlin v. Klutznick*, No. 81-7 (D.Del.); *City of College Park v. Klutznick*, No. C-80-2252-A (N.D. Ga.); *City of East Point v. Klutznick*, No. C-80-2227-A (N.D. Ga.); *Hatcher v. Klutznick*, No. H-80-742 (N.D. Ind.); *Conway v. Klutznick*, No. 80-1549-C (3) (E.D. Mo.); *Krodinger v. Klutznick*, No. 80-1636-C (1) (E.D. Mo.); *Defino v. Klutznick*, No. 80-3896 (D.N.J.); *Gibson v. Klutznick*, No. 80-3438 (D.N.J.); *Jasienski v. Klutznick*, No. 80-4142 (D.N.J.); *New Mexico v. Klutznick*, No. 80-0726-C (D.N.M.); *Lewis v. Klutznick*, No. 80-862-Civ-5 (E.D.N.C.); *Drakeford v. Klutznick*, No. C-80-645D (M.D.N.C.); *Padilla v. Klutznick*, No. 80-2570 (D.P.R.); *City of Willecoochee v. Baldrige*, No. CV 581-05 (S.D. Ga.); *City of Chester v. Klutznick*, No. 80-3309 (E.D. Pa.); *Ferre v. Klutznick*, No. 80-2933 (S.D. Fla.); *City of Duluth v. Klutznick*, No. 5-80-150 (D. Minn.); *City of Atlanta v. Klutznick*, No. C-80-1685A (N.D. Ga.); *Massachusetts v. Klutznick*, No. 80-2232-Z (D. Mass.); *City of Owensboro v. Klutznick*, Civ. No. 80-0201-0(J) (W.D. Ky.); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued sub nom. City of Philadelphia v. Baldrige*, No. 80-2785 (3d Cir. April 24, 1981); *Carey v. Klutznick*, 503 F. Supp. 874 (N.D. Ill. 1980), *appeal dismissed*, No. 80-2375 (7th Cir. Dec. 31, 1980); *Holland v. Klutznick*, No. 80-73302 (E.D. Mich.).

In addition, two non-governmental entities which have filed suit have been transferred to the MDL Court: *Red Lake Band of Chippewa Indians v. Klutznick*, No. 6-80-644 (D. Minn.); *Spanish Coalition for Jobs v. Klutznick*, No. 80-C-2994 (N.D. Ill.). Since the MDL plaintiffs include two non-governmental plaintiffs, the MDL plaintiffs have obtained the consent of both petitioners and respondents to the filing of this Amicus Brief. These consents have been filed with the Clerk of this Court pursuant to Supreme Court Rule 36.

the MDL plaintiffs to begin "first wave" discovery in support of their claims that the Bureau had mismanaged the 1980 census in each of the jurisdictions represented by the MDL plaintiffs.

The MDL plaintiffs' discovery efforts have been stymied by the Bureau's claim that the Bureau's address lists, known as the Master Address Registers ("MARs"), are protected from discovery under the confidentiality provisions of the Census Act, 13 U.S.C. §9 (Supp. 1980). On May 19, 1981, the MDL plaintiffs, pursuant to *Rule* 37(a)(2) of the Federal Rules of Civil Procedure, moved to compel the Bureau to produce the MARs for each of the political subdivisions represented by the MDL plaintiffs. In their motion papers, the MDL plaintiffs outlined for the MDL Court why the MARs were needed:

> The plaintiff political subdivisions [MDL plaintiffs] require the address lists for use during discovery and at trial. Such uses include, *inter alia*, showing where the Bureau missed and/or failed to identify addresses for enumeration of people in the 1980 census, demonstrating patterns of inadequate counting among selected (e.g., minority areas) of political subdivisions, cross-examining local Bureau personnel about the use of the address lists in the field enumerations, and providing a data base for statistical and demographic experts to analyze biases and to document improper Bureau enumeration techniques.

¶8, MDL Plaintiffs' Motion to Compel Production of Master Address Registers and Related Documents, May 19, 1981.

(footnote 1 cont.)

Two census cases which had already been tried and which were on appeal as of January 16, 1981, were not consolidated: *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd* No. 80-1751 (6th Cir. June 15, 1981), and *Carey v. Klutznick*, 508 F. Supp. 20 (S.D.N.Y. 1980), *rev'd* No. 80-6042 (2d Cir. June 12, 1981).

Upon receipt of the MDL plaintiffs' motion and the Bureau's response to the motion, the MDL Court advised the parties that it would not rule on the discoverability of the MARs until the Supreme Court had ruled on the MARs confidentiality question raised in a Freedom of Information Act case (*Baldrige v. Shapiro, cert. granted*, 49 U.S.L.W. 3806 (April 27, 1981) (No. 80-1436)), and until various appellate courts had ruled on the MARs issue in a discovery context (*See McNichols v. Baldrige, supra; see also, City of Philadelphia v. Klutznick, appeal argued, sub nom. City of Philadelphia v. Baldrige*, No. 80-2785 (3d Cir. April 24, 1981); *Carey v. Klutznick*, No. 81-6042 (2d Cir. June 12, 1981)).

This Amicus Brief supports Denver's position that the *vacant* address lists are discoverable. In addition, because vacant address lists are only one part of the MARs and because the related question of the discoverability of *occupied* address lists is not yet resolved, the MDL plaintiffs believe that it is appropriate for this Court, when considering the vacant address list question, to consider the occupied address list question as well.[2]

If the MARs are denied, the plaintiffs will be forced to try their cases without the documents needed to prove and to remedy the Bureau's errors. More importantly, if the MARs are denied, the constitutional rights of the

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2. Because the Bureau takes the position that neither vacant address lists nor occupied address lists can be discovered in litigation, this Brief does not distinguish between vacant address lists and occupied address lists. *See* Memorandum for the Respondents in Response to Denver's Petition for a Writ of Certiorari, *McNichols v. Baldrige*, June, 1981, at 4-5: "The [Denver] case involves a discovery motion to compel production of *address* lists, not an FOIA request." (emphasis added) Accordingly, all references in this Brief to the "MARs" refer to *both* vacant and occupied address lists.

MDL plaintiffs will have been subordinated to the bureaucratic scheme which was originally established to protect, rather than infringe upon, the rights of citizens to equal legislative representation.

SUMMARY OF ARGUMENT

The 1980 census cases underscore the meaning of "one man, one vote." *Wesberry v. Sanders*, 376 U.S. 1 (1964). Each of the MDL plaintiffs has alleged that the 1980 decennial census for that plaintiff's state, county, city or town failed to count a significant percentage of the local population. These failures resulted directly from the Bureau's mismanagement of the local counting efforts. Each MDL plaintiff seeks a judicial order compelling the Bureau to perform an accurate count.

The MARs play an integral part in securing the constitutional rights of the MDL plaintiffs. The MARs are the key in providing an accurate census and, ultimately, in guaranteeing that the constitutional right to "one man, one vote" has practical meaning. If the MARs are inaccurate, the counting process becomes inaccurate, and the rights dependent on the census become hollow.

Through discovery, the MDL plaintiffs seek the MARs to prove and to correct the flawed 1980 census counts. On a specious claim of privilege, the Bureau has refused to produce the MARs, thus placing itself beyond meaningful judicial review. Neither the Constitution, the Congress, nor this Court has ever suggested that the mechanics of the counting process are beyond review or that the counting process itself is as inviolate as each citizen's right to "one man, one vote."

The Constitution requires that the decennial census serve the people. Where the Bureau's service is suspect, then the service must be reviewed and, if necessary,

corrected. Access to the MARs provides the means for such review and correction.

ARGUMENT

I. The Constitutional Framework of the Census Challenges

A. *The Legislative Apportionment Process Requires An Accurate Decennial Census.*

The taking of the census to determine the "whole number of persons" is an integral part of the "Great Compromise" by which the Constitutional Convention of 1787 forged the United States. The necessity for scrutinizing the counts in the 1980 census stems from the constitutional role accorded the census in assuring the integrity of the Compromise.

Article 1, Section 2 of the Constitution establishes the House of Representatives and embodies the Great Compromise. This provision requires apportionment of elected representatives by population as determined through the decennial census:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, *according to their respective Numbers*, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. *The actual Enumeration shall be made* within three years after the first Meeting of the Congress of the United States, and *within every subse-*

> *quent Term of ten Years*, in such Manner as they shall by Law direct.[3]

(Emphasis added).

The Constitution does not tolerate an inaccurate census. The obligation to apportion representatives with precision is indisputable. In 1832, while chairman of a Congressional committee analyzing the proper construction of Article 1, Section 2, Daniel Webster spoke eloquently of the duty imposed:

> The Constitution, therefore, must be understood not as enjoining an absolute relative equality—because that would be demanding an impossibility—but as requiring of Congress to make the apportionment of representatives among the several States, according to their respective numbers, *as near as may be*. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made.

S. Rep. No. 119, 22d Cong., 1st Sess. 4 (1832), *quoted in Preisler v. Secretary of State of Missouri*, 279 F. Supp. 952, 987, *affirmed sub nom. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (emphasis Daniel Webster's). It follows that the accuracy of the census must be evaluated against the same rigorous standards as are the other steps in the apportionment process, *i.e.*, it must be conducted so that

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3. Section 2 of the Fourteenth Amendment modified this provision:

> Representatives shall be apportioned among the several States *according to their respective numbers, counting the whole number of persons in each State*, excluding Indians not taxed.

(Emphasis added).

"as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

Congress cannot apportion representatives "as near perfection as can be" where the Bureau provides population figures known to be deficient. Because the census count is the exclusive tool for determining legislative apportionment, every effort must be made to assure that the count truly accounts for all inhabitants "as near as may be." Thus, unless a court requires the Bureau to correct the counting errors, a curious situation will arise: congressional districts will be designed with "precise mathematical equality" based upon figures known to exclude thousands of citizens.

B. *This Court Has Never Hesitated to Correct Denials of the Constitutional Right to "One Man, One Vote."*

This Court has consistently ruled that actions of a government which impair a citizen's right to equal legislative representation are subject to judicial review. "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 526, 527 (1964).[4]

4. The *Reynolds* standard is based on a long line of decisions in which this Court has thwarted attempts to deny or restrict the right of suffrage. *See e.g., Ex parte Seibold*, 100 U.S. 371 (1880) (dilution of vote through ballot box stuffing held unconstitutional); *Ex parte Yarborough*, 110 U.S. 651, 663 (1884) (right to vote "free from force and fraud"); *United States v. Mosley*, 238 U.S. 383 (1915) (right to have vote counted); *United States v. Classic*, 313 U.S. 299 (1941) (alteration of ballots unconstitutional); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racially based gerrymandering unconstitutional).

The apportionment cases disclose this Court's concern with the more subtle forms of suffrage discrimination: voting rights "can be denied by a debasement or dilution of weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of franchise." *Reynolds*, 377 U.S. at 555. Thus, in *Baker v. Carr*, 369 U.S. 186, 207-08 (1962), this Court permitted judicial review of a statutory classification scheme which "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties." In *Wesberry v. Sanders*, 376 U.S. 1 (1964), congressional districting in Georgia was held unconstitutional after careful judicial scrutiny because the statute at issue contracted the value of some votes while it expanded that of others.

The debasement or dilution of votes cannot be excused because the government may articulate a rational basis for its conduct. The court must be satisfied that there has been a "good faith effort" to achieve *precision*. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969). *See also*, *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Chapman v. Meier*, 420 U.S. 1, 23 (1975) (As regards congressional districting, "population equality appears now to be the preeminent, if not the sole criterion, on which to adjudge constitutionality."). Moreover, once evidence is produced showing that precision has not been achieved, the defendant has the burden of proving that any disparities are "unavoidable despite a good faith effort." That burden is not met merely by characterizing the disparities as *de minimus*. In fact, this Court has held that population variations among congressional districts of 2% to 3% fail constitutional scrutiny. *Kirkpatrick*, 394 U.S. at 530-31. The principle at stake is fundamental:

> Equal representation for equal numbers of people is a principle designed to prevent debasement of

> voting power and diminution of access to elected representation. *Toleration of even small deviations detracts from these purposes.*

394 U.S. at 531 (emphasis added).

As is apparent from the forty census cases now before the MDL Court, the Bureau's mismanagement of the 1980 census resulted in imprecise measurements of population centers around the country. Under the "strict scrutiny" test of *Reynolds* and the percentage deviation standards of *Kirkpatrick*, any congressional redistricting scheme which simply ignores 2-3% of the population would be adjudged constitutionally defective. Yet precisely the same consequences flow from allowing the Bureau to ignore as many persons in the 1980 census. It is inconceivable that the right of citizens to equal representation—to a vote having full weight and value—is extinguishable merely because the offending instrumentality happens to be a federal agency rather than a state legislature. It is also inconceivable that the failures of a federal bureaucracy and the practical sources of relief can be hidden behind a specious claim of privilege.

II. The Master Address Registers Are Crucial to Preservation of the Right to Equal Legislative Representation

A. *The MDL Plaintiffs Seek to Protect Their Right to "One Man, One Vote."*

All the complaints in the census cases share a common theme: deprivation of the constitutional right to "one man, one vote." Each of the MDL cases allege—like the allegations in Denver—that the Bureau mismanaged the 1980 census in a particular state, county, city or town. As a result, those citizens who were not counted have been deprived of their constitutional right to equal

legislative representation. Even those who were counted have suffered a dilution of their vote, which again creates a deprivation of the constitutional right to equal legislative representation. Also, since dozens of federal programs distribute funds on the basis of population, the citizens living in states, counties, cities and towns where an inaccurate count was made have suffered and will continue to suffer a deprivation of their fair share of federal funds.

The individual complaints detail the Bureau's mismanagement of its local counting efforts.[5] For example,

5. The complaints generally raise two theories of improper Bureau action, a miscount theory and an undercount theory. Under the miscount theory, the MDL plaintiffs allege that the Bureau, at the local level, mismanaged the 1980 census by failing to implement techniques suitable for counting a local population. For example, in Boston the Bureau failed to use a method to count the large number of local students, a notoriously transient population. This failure, when combined with inadequate training of census-takers and poor management of local offices, led to a miscount of the local population in Boston. Only one miscount case has actually been tried, *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued, sub nom. City of Philadelphia v. Baldrige*, No. 80-2785 (3d Cir. April 24, 1981).

The undercount theory raises the entirely separate argument that, no matter how well the 1980 census was managed locally, there would be an undercount of the population because of various sociological factors. The undercount claim is based on the Bureau's records from the 1960 and 1970 censuses, in which the Bureau admitted that substantial numbers of minority group members in large urban and poor rural areas were not counted. For example, in 1970 the Bureau found that 18% of black males between the ages of 25 and 44 were not counted. *See* U.S. Bureau of Census, Census of Population and Housing: 1970 Evaluation and Research Program, PHC (E)-4, "Estimates of Coverage of Population of Sex, Race, and Age: Demographic Analysis" (1973). The undercount theory seeks an adjustment to compensate for the undercount. Thus, an appropriate adjustment factor for black males between the ages of 25 and 44 might be 1.18 times the counted number. *See Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*, No. 80-1751 (6th Cir. June 15, 1981).

in large urban areas such as Chicago and Atlanta, significant numbers of minority group members went uncounted because the Bureau was not equipped to deal with the rigors of counting in the inner cities. Other areas, such as Miami and New Mexico, complained that the Bureau had not counted all aliens. Still others, such as Boston and towns in North Carolina, complained that students were not counted.

The Bureau's local counting problems arose out of the Bureau's poor local management practices. Time and again, the complaints allege that the Bureau employed too few census-takers, poorly trained and supervised those who were hired, used misleading and inaccurate forms, stumbled on local racial and ethnic prejudices, changed internal management practices, and gave conflicting orders to various district offices—all of which led to inaccurate counts.

Through the discovery coordinated by the MDL Court, the MDL plaintiffs are now developing evidence of the Bureau's problems. However, in order to prove the effect of these failures—and, most importantly, in order to give the courts a means of correcting these failures—the MDL plaintiffs must have the Bureau's address lists, which show where the counts were taken and, by omission, where the counts were not taken.

B. ***The Master Address Registers are the Key Documents in Assuring an Accurate Decennial Census.***

The key documents in the Bureau's decennial counting efforts are the MARs because the MARs list all addresses in a counting district. If addresses did not appear on the MARs, then the people residing at the unlisted addresses were not counted.

According to the Bureau publications, the MARs were derived from commercial address lists, mailing lists and other public sources, checked for accuracy by Post Office workers and Bureau employees, and then compiled into "enumeration districts"[6] throughout the country. Census questionnaires[7] were mailed out by using the addresses on the MARs. Personal follow-up interviews were ordered if the MARs showed that questionnaires were not answered. Comments on the status of the count for each individual address in each enumeration district were recorded on the MARs.[8] A blank copy of the MARs form is shown in Appendix A of this Brief.

To obtain evidence of how the Bureau mismanaged the local counts, the MDL plaintiffs moved for production of the MARs for each complaining political subdivi-

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6. An "enumeration district" is a term which the Bureau uses to describe a geographic area for census purposes. In a city every address is assigned to a "block," which is approximately the size of one city block. Census "blocks" are then aggregated to form "block groups," which are then aggregated to form "enumeration districts." "Enumeration districts" are, in turn, aggregated to form census "tracts." For example, in Philadelphia there are approximately 20,000 blocks, 2,276 enumeration districts, and 364 census tracts.

7. The census questionnaires are the forms which each citizen is required to complete. The questionnaires, in both a "short" and "long" form, provide specific information about name, age, race, sex, etc., for each respondent. The MDL plaintiffs do not seek access to the questionnaires.

8. The Tenth Circuit's decision in *McNichols v. Baldrige* refers to the updated master address registers as "follow-up address registers" ("FARs"), 664 F.2d at 845. For purposes of this Amicus Brief, the MARs and the FARs are identical since the issue before this Court is whether address lists, regardless of form, can be obtained from the Bureau. *Accord*, Memorandum for the Respondents in response to Denver's Petition for a Writ of Certiorari, *McNichols v. Baldrige, cert. granted*, 49 U.S.L.W. 3931 (June 15, 1981) (No. 80-1781); *see also*, footnote 9, *infra*.

sion.[9] With the MARs in hand, each MDL plaintiff will be able to provide evidence of the Bureau's failure to count in specific enumeration districts. Thus, the MARs will permit the plaintiffs to develop statistical studies to show bias in specific areas, to compare address lists made by the Bureau with address lists provided by the political subdivision's planning commission or local utilities, to show the magnitude of the Bureau's errors caused by the numerous manual additions to the MARs, to test the accuracy of Bureau claims that complete counts were made in every case, and to provide proof that, as told to the MDL plaintiff by the Bureau's census-takers, the MARs were in such disarray that it was impossible to use them effectively to count all people. In short, the MARs are crucial to each MDL plaintiffs' proof.

C. *The Census Act Does Not Prohibit Disclosure of the Master Address Registers to Litigants Seeking an Accurate Count.*

The Bureau argues that the MARs are protected from discovery by the confidentiality provisions of the Census Act, specifically 13 U.S.C. §9 (Supp. 1980). That position is untenable. Neither the language of Section 9 nor any other provision of the Census Act, expressly or by

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9. The MDL plaintiffs' production request for the MARs refers to Production Requests 12 and 13 of Plaintiffs' First Request for Production of Documents, May 4, 1981, filed with the MDL Court in Baltimore:

> 12. The master address register ("MAR"), follow-up address register ("FAR") and/or any other address compilation for the political subdivision listing the address of each dwelling unit in the political subdivision.
>
> 13. The address list of the vacant dwelling/housing units enumerated in the 1980 census in the political subdivision.

fair implication, prohibits the disclosure of the MARs to litigants seeking an accurate count.

Section 9 reads as follows:

> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8[10] of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

---

10. Section 8 provides, in pertinent part, as follows:

> (a) The Secretary may, upon written request, furnish to any respondent, or to the heir, successor, or authorized agent of such respondent, authenticated transcripts or copies of reports (or portions thereof) containing information furnished by, or on behalf of, such respondent in connection with the surveys and census provided for in this title, upon payment of the actual or estimated cost of searching the records and furnishing such transcripts or copies.
>
> (b) Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies, and establishments of the Federal Government, the government of the District of Columbia, the government of any possession or area (including political subdivisions thereof) referred to in section 191(a) of this title, State or local agencies, or other public and private persons and agencies, upon payment of the actual or estimated cost of such work. In the case of nonprofit agencies or organizations, the Secretary may engage in joint statistical projects, the purpose of which are otherwise authorized by law, but determined by the Secretary.
>
> (c) In no case shall information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title.

13 U.S.C. §8 (Supp. 1980).

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purpose of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individuals or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

13 U.S.C. §9 (Supp. 1980).

Section 9(a)(1) does not prohibit disclosure in discovery. The MDL plaintiffs, in demanding accurate statistics for their states, counties, cities and towns, are seeking to "use" the MARs for the very "statistical purposes for which [they are] supplied," *i.e.*, to determine the "whole number of persons" residing in a particular political subdivision. The MDL plaintiffs have not asked the Bureau to use any information "furnished" by any person. Nor have the MDL plaintiffs made any demand upon any Bureau official to do anything for any purpose other than to obtain an accurate count. The MDL plaintiffs seek only to use information which the Bureau itself uses to locate those addresses where people reside. Disclosure of the MARs in litigation aimed at insuring the accuracy of the census is entirely consistent with the mandate of Article I, Section 2 of the Constitution and with §9(a)(1) of the Census Act.

Section 9(a)(2) does not prohibit "publication" of the MARs because the MARs do not give any information about the persons or entities which *"furnished"* the addresses contained on the lists. In fact, since the Bureau itself prepared the address lists from the sources other than census respondents, there is not even an issue of disclosing "data *furnished* by any particular establishment or individual." (emphasis added). Equally important, the MARs do not identify particular characteristics (*e.g.*, sex, race, age) which conceivably could allow "any particular establishment or individual . . . [to be] identified."[11] Similarly, the vacant address lists do not identify the persons (in this case, individual census-takers) who furnished the address of the vacancy. Of course, by definition, listing of a unit as vacant can give no indication of the characteristics of "non-existent" persons.

Assuming, *arguendo*, that the MARs are covered by §9(a)(2), their release to the plaintiffs, pursuant to Fed. R. Civ. P. 26, does not constitute "publication."[12] In fact, similar "publication" arguments advanced by federal agencies have been rejected by the courts. For exam-

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11. To the extent that some names may appear on the MARs in their present condition or that the MARs contain personal information obtained from census respondents, the MDL plaintiffs have requested that such information be stricken from any documents which are produced. *See* MDL plaintiffs First Request for Production of Documents, May 4, 1981.

12. The Census Act recognizes that there is a distinction between "disclosure" and "publication." Section 302 of the Act, which concerns foreign trade and which was added in 1962 after the decision in *St. Regis Paper Company v. United States*, 368 U.S. 208 (1962), see Section II, D., *infra*, permits the Secretary to make rules ". . . for such confidentiality, *publication*, or *disclosure*, of information collected hereunder as he may deem necessary. . . ." 13 U.S.C. §302 (Supp. 1980) (emphasis added). Thus, even if "publication" were prohibited by §9(a)(2), then "disclosure," which the Census Act itself distinguished from "publication," would not be prohibited.

ple, in *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968), the plaintiff trustee in bankruptcy sought discovery of documents held by the Secretary of Agriculture which reflected the transactions, trading patterns and names of persons who operated in the commodity exchange markets. The secretary claimed that the requested material was privileged under §8 of the Commodity Exchange Act (7 U.S.C. §12 (1968) (amended 1978)), which prohibits the "publication" of "data and information which would separately disclose the business transactions of any person and trade secrets of names and customers." The District of Columbia Circuit allowed discovery of the material, reasoning that:

> [L]imited *disclosure* in judicial proceedings, carefully curtailed by judicious use of protective orders authorized by Rule 30 [now Fed. R. Civ. P. 26], is not a *publishing* barred by the section. . . . *In the absence of a specific prohibition against disclosure in judicial proceedings*, such as Congress set forth in some statutes, clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice. That kind of indication is not provided by §8, where both the language used and the statutory setting plainly reflect Congressional concern with widespread dissemination of information not otherwise available to the public, and not with *disclosure* in judicial proceedings.

405 F.2d at 1348-49 (footnote omitted) (emphasis added).

Section 9 specifically does not concern itself with disclosure in judicial proceedings where the information would be made available under a protective order for the express purpose of accomplishing the enumeration required by the statute. The MDL plaintiffs' claim for access to documents is, if anything, more compelling

than that asserted by the plaintiff in *Freeman*, since the MDL plaintiffs seek the information for a public rather than a private purpose and since the information does not provide the names of any individuals or describe any personal characteristics. *See also*, *Rosee v. Chicago Board of Trade*, 36 F.R.D. 684 (N.D. Ill. 1965).

The language of *Freeman* also highlights another reason why §9 does not prohibit disclosure. The *Freeman* court noted that the Commodity Exchange Act did not contain "a specific prohibition against disclosure in judicial proceedings, such as Congress set forth in some statutes." 405 F.2d at 1348. Here the Census Act contains no specific prohibition against disclosure of the MARs. Indeed, the *only* specific prohibition concerns the census questionnaires themselves:

> Copies of census reports which have been . . . retained [by census respondents] shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit or other judicial or administrative proceeding.

13 U.S.C. §9 (Supp. 1980). Conspicuous by its absence is any statutory prohibition against disclosure of information prepared by the Bureau for identifying those addresses to be contacted during the census.[13]

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13. Equally revealing in the statutory scheme is §8 of the Census Act, *quoted in* footnote 10, *supra*. This section permits disclosure of "tabulations and other statistical materials which would not disclose the information reported by, or on behalf of, any *particular* respondent. . . ." (emphasis added). Thus, §8(b), like §9(a), protects the identity of individual census respondents. Further, §8(c) provides that information furnished in the "tabulations and statistical materials" cannot be used to the detriment of any respondent or other person to whom such information relates. . . ." 13 U.S.C. §8(c) (Supp. 1980). Again, the limits of the protection become clear: information furnished by the enumerated population is protected.

Finally, Section 9(a)(3) cannot block the MDL plaintiffs' request for the simple reason that the MDL plaintiffs do not seek "to examine the individual reports."

D. *The Case Law and Legislative History of §9 Limit the Scope of Confidentiality Under the Census Act.*

The only case in which this Court has dealt with Census Act privilege claims rejects the Bureau's statutory privilege argument. In *St. Regis Paper Company v. United States*, 368 U.S. 208 (1961), this Court held that a private corporation had to furnish to a separate federal investigating agency file copies of the corporation's report to the Bureau even though the Bureau had advised the public that the reports were protected. This Court specifically refutes the theory that §9 prohibits disclosure:

> As we have seen, *the prohibitions against disclosure contained in* §9 run only against the officials receiving such information and *do not purport to generally clothe census information with secrecy.* The Solicitor General admits that "literally construed" the restrictions of the statute go no further. But he insists that since the purpose of the statute is to encourage the free and full submission of statistical data to the Bureau, this can be accomplished only through the creation of a confidential relationship which will extend the privilege to the petitioner and like reporting companies. . . . *We fully realize the importance*

(footnote 13 cont.)

Accord, United States v. Bethlehem Steel Corporation, 21 F.R.D. 568, 570 (S.D.N.Y. 1958) (the "clear and unambiguous" purpose of the statute "was to protect those who complied with the command of the statute."); *United States v. Little*, 321 F. Supp. 388 (D. Del. 1971).

> *to the public of the submission of free and full reports to the Census Bureau, but we cannot rewrite the Census Act. . . .*

368 U.S. at 217-18 (emphasis added). Thus, the Census Act provided no confidentiality protection for a private corporation which furnished information to the Bureau even though the Bureau had told the corporation that its reports were privileged. By necessity, then, there can be no privilege where there is no submission of data by individuals, where there is no promise of privilege, and where the interest to be served is the public need of assurance that the census count is accurate.

The *St. Regis* decision led to legislation which gave the specific protection claimed by the Bureau. However, Congress expressly rejected a provision that would have prevented use of "all copies of [census] information, reports and other data" in judicial and administrative proceedings. This language was deleted at the explicit request of the Bureau:

> [The proposed amendment] is generally satisfactory, but to avoid any possibility that it might be construed to effect documents other than file copies of census reports, we recommend that [the proposed amendment] be modified to delete the words "any such information, reports, and other data" each place they occur in the bill and to substitute therefor the words "census reports."

Letter dated July 19, 1962, from Secretary of Commerce Hodges to the Chairman of the House Committee on Post Office and Civil Service, *contained in* "Confidential Status of Census Reports", H.R. Rep. N. 2437, 87th Cong., 2d Sess. (1962) at 5. *See also*, "Confidentiality of the Census Reports": Hearings on H.R. 10569 and Similar Bills Before the Committee on Post Office and Civil

Service of the House of Representatives, 87th Cong., 2d Sess. (1962). As a result of these hearings, the *only* statutory protection granted by Congress in response to the *St. Regis* case—and the only exclusion now applicable to judicial proceedings—is for *copies* of Census reports: "Copies of census reports . . . shall be immune from legal process. . . ." 13 U.S.C. §9 (Supp. 1980). This statutory protection simply does not apply to address lists compiled by the Bureau.[14]

Prior to the 1980 census cases, the only case after *St. Regis* dealing with §9 and the claim of immunity from process adopted the strict interpretation of this Court and rejected efforts to expand the protection of §9. In *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 699 (D.C. Cir. 1978), the District of Columbia Circuit analyzed the 1962 amendment and concluded that "Congress enacted a provision protecting only 'copies of census reports which have been retained.' " (footnote omitted). The Appeals Court also noted that Congress rejected the attempt to protect all census "information, reports and other data" because, to do so, would in the testimony of an administration witness "interfere unduly with responsibilities of other agencies of Government in carrying out functions which require information." 595 F.2d at 699. Thus, the Court of Appeals limited the scope of §9 in order to permit the federal government to accomplish its regulatory tasks.

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14. In *Carey v. Klutznick*, No. 81-6042 (2d Cir., June 12, 1981), Judge Stewart, concurring, slip opinion at 3, made the same analysis:

> Thus, the express protection of the statute is circumscribed: (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents; and (3) no one without statutory authority may pursue individual reports.

The *FTC Line of Business* case requires that the Bureau's privilege theory be rejected because the matter now before this Court arises from agencies of government carrying out their responsibility of assuring an accurate count. The federal agency's failure to perform its task of counting all the people has effectively forced the local government agencies—the MDL plaintiffs—to do the work of the Bureau. To deny the MDL plaintiffs access to the MARs would be to eviscerate the holding of *St. Regis*, the Congressional limitations contained in the 1962 amendment, and the subsequent appellate interpretation of §9.[15]

E. *The Tenth Circuit Decision in* McNichols v. Baldrige *Ignores the Language of §9, the Legislative History, and the Relevant Case Law.*

In upholding the Bureau's claim of statutory privilege, the Tenth Circuit in *McNichols v. Baldrige* ignored the specific language of §9, the legislative history of the section, and the relevant case law. As noted above, none of these sources support either the Bureau's arguments or the Tenth Circuit's decision.

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15. Even if the MARs were privileged by statute, the MDL plaintiffs are still entitled to discovery of that information. Similar privileges have been termed "confidential report privileges" and have been held to be qualified rather than absolute. *Association for Women in Science v. Califano*, 566 F.2d 339, 343-44 (D.C. Cir. 1977). Where such a qualified privilege exists, there must be a measuring of "the need of litigants for information possessed by the Government [against] the need of the Government to foster the flow of information provided to it." *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762, 769 (D.C. Cir. 1965). The scope of such a privilege "is limited by its underlying purpose" and by "the fundamental requirements of fairness." *Roviaro v. United States*, 353 U.S. 53, 60-1 (1957). Here there can be little doubt that the MDL plaintiffs' public interest in equal legislative representation is superior to the Bureau's right to control access to information.

The only case cited by the Tenth Circuit, *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977), is irrelevant to the discovery issue before this Court. In *Seymour* a private plaintiff, using the Freedom of Information Act, 5 U.S.C. §552 (1977) ("FOIA"), sought the names and addresses of all companies included within specific "standard industrial classifications" of the Bureau in order to pursue a private interest, namely, a treble damage antitrust suit. The District of Columbia Circuit held that such material was exempt from disclosure under 13 U.S.C. §9(a)(1).

In contrast to *Seymour*, Denver and the MDL plaintiffs, through the *discovery* rules, seek undifferentiated address lists, *i.e.*, lists which by their very nature do not disclose any characteristics of individuals. More importantly, the MDL plaintiffs seek the lists for a public rather than a private purpose. The lists are to be used to obtain an accurate enumeration of the "whole number of persons" within a political subdivision in keeping with the constitutional requisites of equal apportionment.

The public policy favoring nondisclosure of individual names in *Seymour*, protection of the census process from private use, mandates disclosure of the lists in this case. In *Seymour*, the Court suggested that disclosure of specific firms reporting to the Bureau could harm those businesses and thus make full compliance with the Bureau's reporting requests less certain. In the present case, no such harm is possible because the MARs do not provide any clue to the characteristics of any persons. Moreover, the disadvantgage is clearly associated with nondisclosure, since, without the lists, the inhabitants of the plaintiff political subdivisions will suffer dilution of their voting rights, as well as the inevitable increases in tax

burdens and reductions of municipal services brought on by the loss of revenue sharing funds.[16]

Even if FOIA prohibited disclosure of the MARs through a FOIA request, the broader inquiries permitted under the federal discovery rules, which are limited only by relevance, allow discovery of the MARs. As this Court has noted, the rules for access under FOIA do not control discovery under Fed. R. Civ. P. 26:

> The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case; or on the nature of the case . . . . However, it is not sensible to construe [FOIA] to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 n.16 (1975). Thus, the fact that material may be privileged under FOIA does not mean that the same material is privileged in discovery:

> [T]he exceptions to the disclosure in the Act were not intended to create evidentiary privileges for civil discovery . . . . They were intended only to permit withholding of certain types of information from the public generally.

16. In *Carey v. Klutznick*, No. 81-6042 (2d Cir., June 12, 1981), the majority opinion adopted the view of the Tenth Circuit that the MARs are protected from disclosure by 13 U.S.C. §9 (Supp. 1980). The Second Circuit's only support for this conclusion is a quotation from the Tenth Circuit opinion and a footnote reference to *Seymour v. Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977). As this section of the Brief demonstrates and as the Second Circuit's concurring opinion emphasized, the Tenth Circuit decision, relying exclusively on *Seymour*, is erroneous as a matter of law.

Kerr v. United States District Court for the Northern District of California, 511 F.2d 192, 197-98 (9th Cir. 1975), *aff'd* 426 U.S. 394 (1976). *Accord, Pierson v. United States*, 428 F. Supp. 384, 394 (D. Del. 1977) ("The argument apparently is that if the document would qualify for exemption under the Act, then it must be privileged . . . . This argument stands the law on its head."); *See also, United States v. American Telephone & Telegraph Company*, 86 F.R.D. 603, 635 (D.C. D.C. 1979) (material not obtainable under FOIA is not necessarily privileged in discovery.)[17]

The MARs are clearly relevant to the issues raised by the MDL plaintiffs. If a court is concerned about protecting relevant confidential information requested in discovery, then the protective order provisions of *Rule* 26 give whatever protection may be necessary. Thus, through use of protective orders, a court can allow a party, which is subject to court orders and sanctions, to have access to allegedly confidential material.

Here both Denver and the MDL plaintiffs are subject to court control and have stated their willingness to

17. While the MDL plaintiffs have filed this Amicus Brief in support of Denver in *McNichols v. Baldrige*, the MDL plaintiffs also support the position of the respondent Essex County, New Jersey in *Baldrige v. Shapiro*, 49 U.S.L.W. 3806 (April 27, 1981)(No. 80-1436), that the MARs are obtainable under FOIA. As in the Denver case, the Bureau's protection claim in *Shapiro* is premised upon a mistaken belief that §9 creates a statutory privilege and thus is exempt from disclosure under 5 U.S.C. §552(b)(3). Even assuming there were such a statutory privilege, the privilege is a qualified one which requires consideration of the litigants' need for the material. *See* footnote 15, *supra*. *See also, Federal Open Market Commission v. Merrill*, 442 U.S. 340, 362-63 (1979); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 140, 149, note 16 (1975) (in discovery, "litigant's need" relevant). Thus, even if this Court were to reject Essex County's arguments and to conclude that access to the MARs through FOIA is prohibited, discovery of the MARs under Fed. R. Civ. P. 26, with appropriate protective orders, is permissible through the subordination of interest test recognized in the qualified privilege cases.

prepare and abide by appropriate protective orders. By contrast, in *Seymour* there were no controls because, upon release of the information through FOIA, there would be no means of limiting the use of the information. The Tenth Circuit ignored this distinction.[18]

F. *The Master Address Registers are the Source of the Only Practical Remedy in the MDL Cases.*

Ultimately, upon conclusion of the MDL discovery, each MDL plaintiff will have to prove its case before a district court and then present the court with a means of obtaining an accurate count. The MARs are the instrument for obtaining such a remedy.

The mismanagement trials will disclose in detail the facts that the Bureau employed too few census-takers, failed to adequately train and supervise those who were hired, used misleading and inaccurate forms, failed to identify and deal with local racial and ethnic prejudices, changed its own internal management when it became clear that errors were occurring, and gave conflicting orders to different district offices. All of these, while telling of the Bureau's inadequacies, are preliminary, *i.e.*, they do not provide the needed remedy.

The MDL plaintiffs will have to show where people were missed and how the missing people can be counted.

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18. The Tenth Circuit also ignored this Court's directive that privilege claims under the Census Act must be "strictly construed." *St. Regis Paper Company v. United States*, 368 U.S. at 218. The Tenth Circuit thus applied the wrong standard in reviewing the Denver case when it said "Both the history of the Census Act and the broad language of the confidentiality provisions of §9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a *liberal construction* of that immunity which would assure confidentiality." *McNichols*, 644 F.2d at 845. (emphasis added).

With the MARs in hand, the MDL plaintiffs will be able to provide the district court with evidence of failures to count in particular blocks of cities and counties. Most importantly, the MDL plaintiffs will be able to show the district courts in which enumeration districts the Bureau must be ordered to count again or to make other appropriate adjustments. Thus, as a practical matter, the MARs are the source of the only workable remedy in the MDL cases.

III. Public Policy Requires Disclosure of the Master Address Registers.

The preceeding sections of this Brief describe the apportionment process, the role of the census and the MARs in this process, and the MDL plaintiffs' critical need for the MARs. The preceeding sections also point out that, as a matter of statutory interpretation and case law precedent, there is no statutory privilege in §9. Yet, in analyzing the particular issue and the statutory claim of protection, it is important to bear in mind the public policy behind the Census Act.

Congress enacted the Census Act to assure that all the people were counted, as required by Article I, Section 2 of the Constitution. Section 141(a) of the Census Act embodies this directive to the Bureau: "The secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population. . . ." 13 U.S.C. §141(a) (Supp. 1980). Thus, the Bureau is charged with the task of counting the people.

The Bureau's task of counting is always subordinate to the constitutional mandate of equal legislative representation. Yet, by its claim of privilege, the Bureau has unilaterally decided that its role in the enumeration process is beyond public scrutiny. In simplest terms, the

Bureau has placed its ministerial functions above the level of each citizen's constitutional right to equal legislative representation. In the Bureau's eyes, its count is inviolate.

The Bureau's arrogance has no part in our constitutional system. The Constitution requires that the decennial census *serve* the people's right to elect representatives on an equal basis. Where the results of the service are inaccurate, then the results must be changed.

The MARs question before this Court is not founded on a balancing of interests—the people's right to equal legislative representation against the Bureau's right to control access to information. Rather, it rests upon a subordination of interests—the Bureau serves the people's right to equal suffrage. In the thicket of statutory history, judicial interpretation and bureaucratic anxiety raised by the census litigation, it must never be forgotten that the interests of the Bureau remain subordinate to the rights of the citizens.

CONCLUSION

For all the foregoing reasons, the MDL plaintiffs, as Amici Curiae, ask this Court to reverse the ruling of the Tenth Circuit Court of Appeals in *McNichols v. Baldrige*, and to hold that both vacant address lists and occupied address lists are not protected by the Census Act from discovery by litigants who are challenging the Bureau's count.

Respectfully submitted,

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APPENDIX A

Block No. (1)	What is the FULL NAME (first, middle initial, last) of the person who owns or rents this living quarters? What is the EXACT MAILING ADDRESS used by this household (House No., street name, Lockbox No., or Route and Box No., post office name, and ZIP code)?				POST OFFICE			How would you describe the location of this place to someone who has never been here before? ENUMERATOR: If the mailing address is other than house number and street name, describe the location of the place.	Number of units at street address (6)	Type of form (7)	Serial number (box or map) (8)	Date quest. Page Rpnt. Checked in (9)	Number of persons (enter "0" if vacant, conv., rec.) (10)	Block number change (11)	Field C'k GC (12)	Remarks (If written + signature enter name or person in doubt of quest.-omissions) (13)
	Full name of householder (1a)	House No. (2)	Street name, Rural Route and Box No., or Lockbox No. (3)	Apartment No. or unit designation (4)	Name (5a)	State (5b)	ZIP code (5c)	(5d)								